SUPREME COURT, U. S.

JUL

MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-87

MADONNA J. POTTER,
Petitioner
v.
STATE PERSONNEL
BOARD OF REVIEW,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Pertinent Constitutional And Statutory Provisions	2
Statement Of The Case	2
Reasons For Granting The Writ	
A. Section 143.44, Revised Code of Ohio, Expressly Permits What Section 143.41, Revised Code of Ohio, Expressly Prohibits, Thereby Making The Ohio Statutes Unconstitutionally Vague Insofar As They Would Tend To Prohibit The Type Of Conduct Engaged In By Petitioner	5
Appendix A Opinion Of The Court Of Appeals Of Champaign County, Ohio, Rendered December 8, 1972	9
Appendix B Order Of The Supreme Court Of Ohio Overruling Motion To Certify Record	14
Appendix C Order Of The Supreme Court Of Ohio Dismissing The Appeal Sua Sponte	15
Appendix D Constitutional And Statutory Provisions	16
Appendix E Order Of The State Personnel Board Of Review	21

Appendix F 24
Memorandum Of Decision, Findings Of Facts, Conclusions Of Law And Journal Entry Of Judgment of The Court Of Common Pleas Of Champaign County, Ohio

Appendix G 28
Journal Entry Of Judgment Of The Court Of Appeals Of Champaign County, Ohio

TABLE OF AUTHORITIES

Page

Cases

Ex Parte Curtis
106 U.S. 371 (1882) 5
Gray v. Toledo
(1971) 28 Ohio Misc. 141 6
Heidtman v. City of Shaker Heights
(1955) 163 Ohio St. 109 6
United Public Workers v. Mitchell
330 U.S. 75 (1947) 5, 8
United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO
41 U.S.L.W. 5122 (U.S. June 25, 1973) 5
U.S. v. Wurzbach
280 U.S. 396 (1929) 5

Opinions of Attorney General of Ohio

1944 O.A.G. 649, Opinion No. 7231 7

Statutes

28 U.S.C. 1257 (3) 2
Section 143.27, Revised Code of Ohio 3
Section 143.41, Revised Code of Ohio 5
Section 143.44, Revised Code of Ohio 7

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v.
STATE PERSONNEL
BOARD OF REVIEW,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, Madonna J. Potter, prays for a writ of certiorari to review the orders of the Supreme Court of Ohio entered April 12, 1973, overruling her motion to certify and dismissing her appeal of right from the judgment entered on January 11, 1973, by the Court of Appeals for Champaign County, Ohio, affirming the judgment of the Court of Common Pleas of Champaign County, Ohio, in Case No. 27552.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Champaign County, Ohio, rendered a written decision on December 8, 1972 (Appendix A, *infra*, pp. 9-13), which was not reported.

JURISDICTION

The orders of the Supreme Court of Ohio entered on April 12, 1973, overruling the petitioner's motion for an order directing the Court of Appeals for Champaign County, Ohio, to certify its records (Appendix B, *infra*, p. 14), and dismissing the appeal of right (Appendix C, *infra*, p. 15), are attached hereto. The jurisdiction of this

Court is invoked under Rule 19 of this Court and 28 U.S.C. 1257 (3), which provides for review of final judgments rendered by the highest court of a state by writ of certiorari, "where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

QUESTION PRESENTED

Whether Sections 143.41 and 143.44, Revised Code of Ohio, (the Ohio equivalent of the Federal Hatch Act) are unconstitutionally vague under the First and Fourteenth Amendments to the Constitution of the United States for the reason that Section 143.44, Revised Code, expressly permits what Section 143.41, Revised Code, expressly prohibits.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional and statutory provisions involved herein is contained in Appendix D, *infra*, pp. 16-20. These relevant provisions are:

> First Amendment to the Constitution of the United States, Fourteenth Amendment to the Constitution of the United States; Sections 143.27, 143.41, and 143.44 of the Revised Code of Ohio.

STATEMENT OF THE CASE

Petitioner, Madonna J. Potter, commenced employment in the Auditor's office of the State of Ohio in 1964. She was continually employed by that office, pursuant to the Civil Service statutes of the State of Ohio (Chapter 143, Ohio Revised Code), until March 5, 1971, at

which time she received notice that she was being removed from her classified position of employment as a State Examiner II. The removal order, insofar as pertinent, reads as follows:

"STATE OF OHIO
DEPARTMENT OF STATE PERSONNEL

"Mrs. Madonna J. Potter

"This will notify you that you are being removed from the position of (1502) State Examiner II effective March 5, 1971.

"The reason for this action is that you have been guilty of misconduct, i.e. political activity in the following particulars, to wit: That while an employee of the State Auditor's Office you did engage in political activity contrary to section 143.41 O.R.C.

"You were active in Mr. Cloud's 1966 political campaign for State Auditor, in addition to Mr. Cloud's 1970 campaign for Governor.

"While you were assigned to Mr. Gene Littler's section, you did, along with another employee, function as a campaign aide on behalf of Mr. Cloud's candidacy for Governor, performing various duties directly involved with the campaign.

"Columbus, Ohio March 5, 1971.

/s/ JOSEPH T. FERGUSON
Auditor of State"

Under the provisions of the Civil Service laws of the State of Ohio, and specifically Section 143.27, Revised Code of Ohio, petitioner had a direct right of appeal of this removal order to the State Personnel Board of Review of the State of Ohio. Petitioner exercised that right of appeal, and a full hearing was held before the State Personnel Board of Review of the State of Ohio on March 29, 1971. During the course of that hearing petitioner admitted under oath that she had engaged in the following activities:

1. That she worked during the 1966 political campaign on behalf of the candidacy of Roger Cloud for the office of Auditor of the State of Ohio;

2. That during the 1970 calendar year when she was employed in the office of Roger Cloud as Auditor for the State of Ohio, she typed letters during office hours at the express direction of her supervisors, which letters were, in her opinion, "of a political nature";

3. That during the 1970 campaign of Roger Cloud for the office of Governor of the State of Ohio she typed letters and stuffed envelopes at home on weekends, which letters supported the candidacy of Roger Cloud for Governor.

In an order issued April 15, 1971, the State Personnel Board of Review of the State of Ohio affirmed the removal of petitioner. (Appendix E, *infra*, pp. 21-23).

As was her right pursuant to the Administrative Procedure Act of Ohio (Chapter 119, Revised Code of Ohio), petitioner appealed the order of the State Personnel Board of Review to the Court of Common Pleas of Champaign County, Ohio. In a Memorandum of Decision and Journal Entry of Judgment rendered June 30, 1972, that Court affirmed the order of the State Personnel Board of Review of Ohio. (Appendix F, *infra*, pp. 24-27).

Petitioner subsequently appealed to the Court of Appeals for Champaign County, Ohio, which Court affirmed the judgment of the Court of Common Pleas of Champaign County, Ohio. (Appendix G, *infra*, p. 28).

Petitioner then appealed to the Supreme Court of Ohio, which Court declined to exercise jurisdiction in this cause.

Petitioner now requests that this Court exercise jurisdiction over this cause.

HOW FEDERAL QUESTIONS PRESENTED

The constitutional questions here involved were first put in issue before the Court of Common Pleas of Champaign County since the State Personnel Board of Review of the State of Ohio does not have jurisdiction to determine whether the statutes of the State of Ohio are constitutional under the Ohio Constitution or the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

A. *Section 143.44, Revised Code Of Ohio, Expressly Permits What Section 143.41, Revised Code Of Ohio, Expressly Prohibits, Thereby Making The Ohio Statutes Unconstitutionally Vague Insofar As They Would Tend To Prohibit The Type Of Conduct Engaged In By Petitioner.*

This Court long ago determined that there was a valid governmental interest in restricting partisan political activity of employees of the government, *Ex Parte Curtis* 106 U.S. 371 (1882); *U.S. v. Wurzbach* 280 U.S. 396 (1929); *United Public Workers v. Mitchell* 330 U.S. 75 (1947); and this Court has very recently reaffirmed the correctness of that position. *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO* 41 U.S.L.W. 5122 (U.S. June 25, 1973). This Court has noted that all 50 states have enacted some form of legislation to restrict the political activities of state employees. *Id*, 5126.

In Ohio the Code provision which prohibits political activity on the part of classified civil service employees of the State of Ohio is Section 143.41, Revised Code. That statute provides, in its entirety, as follows:

> "No officer or employee in the classified civil service of the state, the several counties, cities, and

> city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions."

This statute has been construed by the Supreme Court of Ohio to prohibit only "partisan political activity". *Heidtman v. City of Shaker Heights* (1955) 163 Ohio St. 109. Furthermore, the constitutional validity of the statute was expressly considered by the United States District Court for the Northern District of Ohio in the case of *Gray v. Toledo* (1971) 28 Ohio Misc. 141, and that Court determined that Section 143.41, Revised Code, is constitutionally valid.

Except for the instant cause, counsel for petitioner have been unable to find a decision where the constitutionality of Section 143.41, Revised Code, has been drawn into question except for the *Gray* decision.

However, the Court in the *Gray* case did not consider the effect of Section 143.44, Revised Code, upon the provisions of Section 143.41, Revised Code.

Sections 143.41 and 143.44, Revised Code, were enacted as part of the same act of the General Assembly of Ohio and must be read *in pari materia*. See, 103 Ohio Laws 698 as amended by 106 Ohio Laws 400.

Section 143.44, Revised Code, provides insofar as pertinent to a determination in the instant cause, as follows:

> "No officer or employee of the state . . . shall . . . discharge . . . any . . . employee . . . in the classified service, . . . for giving . . . any contribution of money or other valuable thing for any party or political purpose, . . ."

Apparently there are no reported cases in Ohio construing the provisions of Section 143.44, Revised Code of Ohio. However, the Attorney General of the State of Ohio has rendered an opinion regarding the provisions of Section 143.44, Revised Code, which opinion may be found at 1944 O.A.G. 649, Opinion No. 7231 and the syllabus of which reads as follows:

> "An employe in the classified civil service, who voluntarily contributes either to political organizations or to a campaign fund of a candidate running for political office, may do so without violating any of the provisions of the Civil Service Laws, viz., Sections 486-1 to 486-31, both inclusive, General Code." [Sections 143.01 to 143.48 Revised Code] (Brackets added.)

Thus, Ohio has a statute which expressly prohibits the termination of employment of civil service employees for making contributions of money or other valuable things for "party or political purpose,", and also has a statute which makes it a basis for termination of a member of the classified civil service of the State of Ohio to do anything in support of a partisan political cause "other than to vote as he pleases and to express freely his political opinions."

The Court of Appeals expressly determined that the rendition of services in support of a partisan political cause which petitioner admittedly engaged in, did not constitute a "contribution of money or other valuable thing," in support of a political cause, and therefore that

petitioner was not entitled to the protection of Section 143.44, Revised Code.

This Court recognized in the *Mitchell* case that the rendition of services to a partisan political organization can be just as valuable as a contribution of money, and that Section 9 of the Hatch Act was directed against the rendition of services. This Court specifically stated that:

> "The provisions of Section 9 of the Hatch Act and the Civil Service Rule 1 are not dissimilar in purpose from the statutes against political contributions of money. *The prohibitions now under discussion are directed at political contributions of energy by government employees.*" (Emphasis added.)

The position of petitioner to this Court may be simply stated as follows:

1. Section 143.44, Revised Code of Ohio, protects the job tenure of a classified civil service employee of the State of Ohio when that employee makes a contribution "of money or other valuable thing for any party or political purpose."

2. Section 143.41, Revised Code, prohibits classified civil service employees of the State of Ohio from engaging in partisan political activity "other than to vote as he pleases and to express freely his political opinions."

3. These two statutes when construed *in pari materia* create standards of conduct mandatory upon employees in the classified civil service of the State of Ohio which are impermissibly vague and therefore unconstitutional.

Respectfully submitted,

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN
By TIMOTHY J. UCKER
42 East Gay Street
Columbus, Ohio 43215

Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

Case No. 72-6

MADONNA J. POTTER,

Appellant,

—vs—

STATE PERSONNEL BOARD OF REVIEW,

Appellee.

* * *

OPINION

Rendered on the 8th day of December, 1972.

* * *

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN, By Timothy J. Ucker, Of Counsel, 42 E. Gay Street, Columbus, Ohio 43215,

Attorneys for Appellant.

WILLIAM J. BROWN, Attorney General, By John T. Conroy, Assistant, Ohio Departments Building, 65 S. Front Street, Columbus, Ohio 43215,

Attorneys for Appellee.

* * *

CRAWFORD, J.

Appellant, a classified employee, was removed as State Examiner II in the office of the Auditor of State on the basis that she had engaged in political activity, in violation of Section 143.41, Revised Code. Pursuant to Section 143.27, Revised Code, she appealed to the State Personnel Board of Review, which issued its order upholding the removal; and then to the Court of Common Pleas, which sustained the order of the Board. She has now appealed to this court.

Section 143.27, Revised Code, makes applicable Sec-

tion 119.12, Revised Code, according to which the Court of Common Pleas may affirm the order of the agency complained of in the appeal if it finds that the order is supported by reliable, probative and substantial evidence and is in accordance with law.

There is actually no real issue as to the facts.

Appellant frankly admitted the acts complained of. The Court of Common Pleas found that in the 1966 political campaign appellant placed in the front yard of her residence a sign urging the election of Roger Cloud as Auditor of State; that in the 1970 gubernatorial campaign, at the request of her supervisor, she typed letters of a "political nature" on office time; that at the request of her supervisor she willingly typed campaign envelopes and stuffed campaign mailings into envelopes at her home during off-duty hours in the 1970 gubernatorial election.

The court disregarded any activity in 1966 as too remote; and we approve that conclusion.

Section 143.41, Revised Code, which appellant is charged with violating, provides:

> "No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts

> thereof, be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions."

Appellant seeks to justify her position by the language of Section 143.44, Revised Code, which reads:

> "No officer or employee of the state or the several counties, and city school districts thereof, shall appoint, promote, reduce, suspend, lay off, discharge, or in any manner change the official rank or compensation of any officer or employee in the classified service, or promise or threaten to do so, for giving, withholding or neglecting to make any contribution of money or other valuable thing for any party or political purpose, or for refusal or neglect to render any party or political service."

She argues, first, that her work of addressing and stuffing campaign envelopes was a "valuable thing" which she might therefore contribute with impunity under Section 143.44, Revised Code. However, that section itself distinguishes between "contribution of money or other valuable thing" and the rendering of "any party or political service." Hence, her service cannot be excluded from the forbidden acts by attempting to call it the contribution of a valuable thing.

Her second argument or assignment of error is that:

> "Unless the type of political activity forbidden by the provisions of Section 143.41, Revised Code, is narrowly defined, the provisions of that statute are unconstitutional. The trial court erred in its conclusion that 'In the instant (action) the statutory prohibition of political activity is a valid statute in that it is not ambiguous or vague as it applies to this particular individual.' "

In the only two Ohio cases cited, Section 143.41, Revised Code, has been construed to forbid only partisan political activity. *Gray vs. Toledo*, 28 Ohio Misc., 141, 323 F. Supp., 1281 (1971); and *Heidtman vs. City of*

Shaker Heights, 163 Ohio St., 109, 126 N. E. (2d), 138 (1955).

We are unable to refrain from comment upon the irony of the distinction in *Heidtman*. According to that case, the statute, while forbidding party politics, which is surely not malum in se, would nevertheless permit activity for the benefit and protection of civil servants, and thus preserve and very likely enlarge the burdensome bureaucracy which, like encrusted barnacles, threatens to sink the already badly listing ship of state. However, this observation is civic rather than judicial, and falls in the pre-empted field of inscrutable legislative policy.

The federal cases cited by appellant lend no support to her argument that the Ohio statutes are invalid for ambiguity and vagueness. They were decided upon the language of the Hatch Act.

United Public Workers vs. Mitchell, 330 U. S., 75 (1947), upheld the finding of a violation under Section 9(a) of the Hatch Act which forbade taking an "active part in political management or political campaigns" by a defendant who acted outside working hours as a ward committeeman of a political party and who was politically active on election day as a worker at the polls and as a paymaster for the services of other workers.

In *National Association of Letter Carriers, AFL-CIO, et al., vs. U. S. Civil Service Commission*, 346 Fed. Supp., 578 (1972), a three-judge district court held invalid for vagueness Section 15 of the Hatch Act, which provided:

> ". . . the phrase 'an active part in political management or political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by

> determinations of the Civil Service Commission under rules prescribed by the President."

The opinion states that there were some three thousand of these rulings between 1886 and 1940, which were not before Congress when the Act was passed, and which contained sweeping indefiniteness that no one would even attempt in these days to defend if analyzed against the strictures of the Fifth Amendment.

The admitted acts of the appellant in our present case were clearly within the activities proscribed by the statute.

The judgment will be affirmed.

* * *

SHERER, P.J., and KERNS, J., concur.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM

To wit: April 12, 1973

THE STATE OF OHIO,
City of Columbus.

MADONNA J. POTTER,

Appellant,

vs.

STATE PERSONNEL BOARD OF REVIEW,

Appellee.

No. 73-152

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CHAMPAIGN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Timothy J. Ucker.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this_____day of_____ 19____

_____ *Clerk*

_____ *Deputy*

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM

To wit: April 12, 1973

THE STATE OF OHIO,
City of Columbus.
MADONNA J. POTTER,

Appellant,

vs.

STATE PERSONNEL BOARD OF REVIEW,

Appellee.

No. 73-152

APPEAL FROM THE COURT OF APPEALS FOR CHAMPAIGN COUNTY

This cause, here on appeal as of right from the Court of Appeals for CHAMPAIGN *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CHAMPAIGN *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this____ day of_____ 19____

_____ *Clerk*

_____ *Deputy*

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

REVISED CODE OF OHIO

§143.27 Tenure of office; reduction, suspension, removal and demotion.

The tenure of every officer or employee in the classified service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof, holding a position under sections 143.01 to 143.48, inclusive, of the Revised Code, shall be during good behavior and efficient service and no such officer

or employee shall be reduced in pay or position, suspended, or removed, except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of state personnel or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

In any case of reduction, suspension of more than five working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of state personnel and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

In the case of the suspension for any period of time, or demotion, or removal of a chief of police or a chief of a fire department or any member of the police or fire de-

partment of a city, the appointing authority shall furnish such chief or member of a department with a copy of the order of suspension, demotion, or removal, which order shall state the reasons therefor. Such order shall be filed with the municipal civil service commission. Within ten days following the filing of such order such chief or member of a department may file an appeal, in writing, with the municipal civil service commission. In the event such an appeal is filed, the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on questions of law and fact may be had from the decision of the municipal civil service commission to the court of common pleas in the county in which such city is situated. Such appeal shall be taken within thirty days from the finding of the commission.

HISTORY: GC §486-17a; 106 v 400 (412); 114 v 224, §1; 126 v 90, §1; 128 v 1049 (1064), §1 (Eff. 11-2-59); 129 v 1330 (1332), §1 (Eff. 10-27-61); 131 v. 128 (Eff. 9-13-65); 132 v S 271, §1. Eff. 12-13-67.

Analogous in part to former RC §143.26 repealed 129 v 1334, §2.

§143.41 Political activity prohibited. (GC §486-23)

No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner con-

cerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions.

HISTORY: GC § 486-23; 103 v 698 (710), §23; 106 v 400(416). Eff. 10-1-53.

For former analogous sections, see former GC §§4497, 4500 and 4501.

§143.44 Abuse of official power for political reasons prohibited. (GC §486-26)

No officer or employee of the state or the several counties, cities, and city school districts thereof, shall appoint, promote, reduce, suspend, lay off, discharge, or in any manner change the official rank or compensation of any officer or employee in the classified service, or promise or threaten to do so, for giving, withholding or neglecting to make any contribution of money or other valuable thing for any party or political purpose, or for refusal or neglect to render any party or political service.

HISTORY: GC §486-26; 103 v 698 (711), § 26; 106 v 400 (417). Eff. 10-1-53.

For an analogous section, see former GC §4502.

APPENDIX E

STATE PERSONNEL BOARD OF REVIEW

Room 102, Ohio Departments Building
5 South Front Street
Columbus, Ohio 43215
Phone 469-4310
April 15, 1971

Mrs. Madonna J. Potter
Cushman Road
Mechanicsburg, Ohio 43044

Mr. Joseph T. Ferguson
Auditor of State
State House
Columbus, Ohio

Dear Mrs. Potter and Mr. Ferguson:

ORDER

This matter came on for hearing before the State Personnel Board of Review on the appeal of Madonna J. Potter from a removal order removing her from her position as a State Examiner II in the Office of the Auditor of State, and upon the evidence adduced at the hearing.

While the removal order charges misconduct, the misconduct charged in the specifications is strictly political activity in violation of Section 143.41 of the Revised Code. There is no allegation of dishonesty or any offense involving moral turpitude, nor is there any allegation of incompetency or inefficiency in the appellant's work.

The political activity charge is divided into two parts —political activity in 1966 and political activity in 1970. Turning first to the earlier activity, the Board feels that

such activity, although proven, is now too remote in time to base a removal order upon it. Although there is some merit to the argument of the appellee that this was the first real opportunity for someone to have done something about it, if these allegations were standing alone and the appellant had engaged in no further activity over the intervening period of almost five years, the Board would find it extremely difficult to affirm a removal order.

This, of course, is not the case here, since there was evidence that appellant did engage in political activity during 1970, particularly in the latter part of that year. This political activity consisted primarily of two types. The first was typing campaign letters in the office, apparently during working hours. We consider this to be the more serious of the two, but the appellant was requested to do this by a superior. This raises the difficult question as to whether appellant had a mandatory duty to refuse to violate the law and decline the request of the superior (probably running the risk of incurring the displeasure of such superior), or whether appellant should have obeyed the request of the superior and run the risk of removal (now a reality). This would be a most difficult choice for any employee to say the least. However, we have in evidence the appellant's letter, written in 1966, which is at least evidence of a prior and presumably continuing desire to help in the campaign. This is substantiated by the appellant's actions as to the second type of her political activity in 1970.

Appellant herself testified that she did type campaign letters at home on weekends and off-duty hours; that she went to campaign headquarters to secure the materials; and in all candor admitted that this was voluntary on her part. Such efforts on her own time to assist in her employer's campaign would seem perfectly natural, and

it seems to us there is a philosophical question as to whether this *should* be justification for removal.

We are not, however, permitted the luxury of the philosophizing. The Legislature, in order to preserve the inherent protection of civil service tenure, has prohibited certain specific activities of a political nature in Section 143.41 of the Revised Code and then, in its wisdom, gone further in that Section to say, in pertinent part:

> "* * * nor shall any officer or employee in the classified service of the state * * * take part in politics other than to vote as he pleases and to express freely his political opinions."

The appellant was clearly in the classified service of the state, and her political activity went beyond her voting or expressing a political opinion. We must therefore conclude—reluctantly, to be sure—that this appellant, no matter how good an employee she might have been, was subject to removal.

It is therefore ordered and adjudged that the removal order should be, and the same hereby is, affirmed.

Allison	Aye
Avren	Aye
Cook	Aye

It is hereby certified by this Board that the above language is a copy of the order entered upon its journal in this case. This decision may be appealed under the provisions of Chapters 143 and 119, Ohio Revised Code, by written notice of appeal setting forth the order appealed from and grounds of appeal filed with this Board and the appropriate court within fifteen days after the mailing of this letter.

Very truly yours,
State Personnel Board of Review
/s/ EARL W. ALLISON
Chairman

EWA/man

APPENDIX F

IN THE COURT OF COMMON PLEAS, CHAMPAIGN COUNTY, OHIO

Case No. 27552

MADONNA J. POTTER,

Appellant,

—vs—

STATE PERSONNEL BOARD OF REVIEW,

Appellee.

MEMORANDUM OF DECISION, FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JOURNAL ENTRY OF JUDGMENT

FINDINGS OF FACT

1. This matter came on for hearing on the appellant's notice of appeal filed in this county, appealing a removal order against her entered by the State Personnel Board of Review.

2. The matter is properly before the Court of Common Pleas, of Campaign County, Ohio.

3. No additional evidence is to be taken, and the Court is to confine its decision to the record.

4. The transcript from the State Personnel Board of Review hearing shows that in the 1966 political campaign, Madonna Potter placed in the front yard of her residence a sign urging election of Cloud for Auditor. At that time, Mrs. Potter was a classified employee of the State Auditor's office.

5. The transcript also shows that in conjunction with the 1970 gubernatorial campaign in the State of Ohio, the appellant, at the request of her supervisor, typed letters of a "political nature" on office time.

6. The exact nature of these letters is unknown and the only evidence that political letters were typed was the statement of the individual herself.

7. At the request of her supervisor, the appellant willingly typed campaign envelopes and stuffed campaign mailings into envelopes at her home during off duty hours during the 1970 gubernatorial election.

8. Section 143.41 of the Ohio Revised Code which prohibits political activity reads as follows: "No officer or employee in the classified service of the state, the several counties, cities and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof; nor shall any officer or employee in the districts thereof, be an officer in any political organization or *take part in politics other than to vote as he pleases and to express freely his political opinions.*" [*emphasis added*]

9. Section 119.12 of the Ohio Revised Code provides in pertinent part as follows: "The Court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the Court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding it may reverse, vacate, or modify the order or make such other ruling as is supported by re-

liable, probative and substantial evidence and is in accordance with law.

CONCLUSIONS OF LAW

1. The activities of the appellant in 1966 are so remote in time as to not be properly considered as basis for action at this time.

2. The actions of the appellant in typing envelopes and stuffing envelopes at her home and in typing letters at work are such that they fall within activities prohibited by the Ohio Revised Code, Section 143.41.

3. These activities of typing envelopes and stuffing envelopes and typing letters are not within the protection of free expression of political opinions as set forth by the statute mentioned above.

4. This statute prohibiting the taking part in politics does not distinguish between working time political activity and free time political activity.

5. Protection of efficiency and integrity in public service constitutes sufficient governmental incident to permit limitations upon the rights of public employees unless the proscribed activity is so vague as to not be a workable or understandable prohibition.

6. Any restriction imposed by the governmental public employees political activity must be directly related to the goal of prohibiting the partisan political activity.

7. Any prohibited partisan political activity must be such that it would interfere with efficiency and integrity of the public service. * * * Gray et al. vs. City of Toledo et al. 28 Ohio Misc. 141 (1971).

8. In the instant the statutory prohibition of political activity is a valid statute in that it is not ambiguous or vague as it applies to this particular individual.

9. The judgment of State Personnel Board Review is thereby sustained, and it is the order of this Court that the decision of the State Personnel Board of Review is supported by reliable, probative, and substantial evidence. Therefore, the appeal is dismissed.

Appellants to pay the costs of this matter.

ROGER B. WILSON
Judge

RBW:mlh

A copy of this Journal Entry is being sent to John A. Brown, Attorney for Appellant; and a copy is being sent to John T. Conroy, Assistant Attorney General, Attorney for the Appellee.

APPENDIX G

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

Case No. 72-6

MADONNA J. POTTER,
Appellant,

vs.

STATE PERSONNEL BOARD OF REVIEW,
Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on December 8, 1972, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Common Pleas Court of Champaign County, Ohio, is affirmed.

Judge

Judge

Judge

Approved:
LUCAS, PRENDERGAST, ALBRIGHT, GIRSON, BROWN & NEWMAN.

By TIMOTHY J. UCKER,
Attorneys for Appellant

WILLIAM J. BROWN,
Attorney General

By JOHN T. CONROY,
Assistant Attorney General
Attorneys for Appellee.